

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Retail Access Optimization Initiative

Docket No. N2011-1

PRESIDING OFFICER'S RULING ON DAVID B. POPKIN
MOTIONS REGARDING NON-PUBLIC MATERIAL

(Issued August 15, 2011)

On July 28, 2011, David B. Popkin (Popkin) filed a motion regarding two non-public library references – USPS-LR-N2011-1/NP1 and USPS-LR-N2011-1/NP2.¹ With respect to USPS-LR-N2011-1/NP1, the Motion seeks “an explanation of what Nearest Neighbor Calculations show or why they should be nonpublic.” Motion at 1. With respect to USPS-LR-N2011-1/NP2, the Motion seeks to compel the Postal Service “to provide the revenue bracket that each of the facilities lie[s] in.” *Id.* at 2.² Popkin contends that this will allow participants to “be able to evaluate the accuracy of the listing of facilities subject to evaluation.” *Id.*

On August 4, 2011, the Postal Service filed its response to the Motion.³ With respect to USPS-LR-N2011-1/NP1, the Postal Service asserts that the document qualifies for nonpublic treatment because it “include[s] sensitive commercial

¹ David B. Popkin Motion, July 28, 2011 (Motion); see also David B. Popkin Motion, August 11, 2011.

² The requested revenue brackets are: (1) less than \$27,000 [\$10,000 in Alaska]; (2) between \$27,500 and \$600,000; (3) between \$600,000 and \$1 million; and (4) over \$1 million. *Id.*

³ Response of the United States Postal Service in Opposition to David B. Popkin Motion, August 4, 2011 (Response). The Postal Service's notice of library reference incorporating its application for non-public treatment is also relevant to the Commission's disposition of the Motion. See Notice of United States Postal Service of Filing of Initial Library References and Application for Non-Public Treatment of Materials, July 27, 2011 (Application for Non-Public Treatment).

information, [including] facility-specific walk-in revenue related to operations at thousands of postal retail installations throughout the United States, as well as disaggregated walk-in revenue for selected locations.”⁴ Response at 2 (citing Application for Non-Public Treatment at 2).⁵ The Postal Service also notes that “USPS-LR-N2011/NP1 contains the source data for Table 5” of witness Boldt’s Testimony (USPS-T-1). *Id.* at 2 n.1.

With respect to USPS-LR-N2011-1/NP2, the Postal Service claims that public disclosure of a revenue range for the facilities listed in the library reference would add nothing to the consideration of the issues raised in the docket and would likely cause commercial harm to the Postal Service. *Id.* at 1. It also alleges that the revenue ranges that the Motion requests are “arbitrarily defined.” *Id.* Furthermore, the Postal Service contends that an order directing the Postal Service to separate facilities in those revenue ranges “would require an unnecessary use of scarce Postal Service resources, and would provide no benefit related to the assessment of the Postal Service’s request for an advisory opinion.” *Id.* at 1-2. The Response also reminds the Commission that its rules provide a mechanism for interested persons to gain access to non-public information and implies that such a mechanism should be used here. *Id.* at 3.

The Public Representative filed a statement in support of the Motion.⁶ In the Public Representative’s Statement, she claims that the Postal Service has not provided enough information to adequately assess the Retail Access Optimization (RAO) Initiative. *Id.* The Public Representative further asserts that the Postal Service’s

⁴ The Postal Service makes the same statement with respect to USPS-LR-N2011-1/NP2.

⁵ The Postal Service asserts that the “[m]otion does not ask for any relief regarding the alleged failure to address USPS-LR-N2011-1/NP1.” *Id.* at 2 n.2.

⁶ Statement by the Public Representative in Support of Intervener’s Motion Notice of United States Postal Service of Filing of Initial Library References and Application for Non-Public Treatment of Material, August 8, 2011 (Public Representative’s Statement). The Public Representative also appears to seek additional information beyond that requested in the Motion, including: (1) a requirement that “the Postal Service be required to provide additional costing information for each facility considered as part of its RAO Initiative”; and (2) “all retail facility revenue and cost data filed by the Postal Service in the above-captioned case[] be made public for the purposes of accessing the legitimacy of the RAO Initiative.” *Id.* at 3. These requests are outside the scope of the Motion.

argument that releasing the information contained in the two library references at issue in the Motion is without merit for the following reasons: (1) in Docket No. N2009-1, the Postal Service readily acknowledged the importance of providing data detailing revenue and other categorical information for postal retail facilities slated for discontinuance; (2) the Motion seeks to make already existing information public, so no draw upon additional resources is necessary; and (3) an effective evaluation of the RAO Initiative requires the Postal Service to provide comprehensive facility-by-facility information detailing the cost data associated with the RAO Initiative, including costs ascribable to each facility and a determination of whether closing the facility would enable the Postal Service to capture appreciable savings. *Id.* at 2 (citing Docket No. N2009-1, Presiding Officer's Ruling N2009-1/10, October 1, 2009).

USPS-LR-N2011-1/NP1. Popkin's Motion requests an explanation of what the Nearest Neighbor Calculations show or why they should be non-public. The Motion does not request such information be made public. Rather, Popkin requests a description of the information contained in the library reference so he can make a determination as to whether the Postal Service's request for non-public treatment is appropriate. Essentially, Popkin is requesting that the Postal Service provide detailed information about the purported non-public information similar to a *Vaughn* Index or privilege log. See, e.g., Docket No. R2000-1, P.O. Ruling R2000-1/28 at 4, April 3, 2000; Docket No. C99-1, P.O. Ruling C99-1/9 at 4. In a similar situation, with respect to trial preparation materials, Fed. R. Civ. P. 26(b)(5) would require the Postal Service to "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." See *also* 39 CFR 3001.26(c) and 3001.27(c) ("A participant claiming privilege shall identify the specific evidentiary privilege being asserted and state with particularity the reasons for its applicability."). Nowhere does the Postal Service publically describe USPS-LR-N2011-1/NP1 or its contents. The only public mention of USPS-LR-N2011-1/NP1 is in the

Postal Service's Response where it notes that USPS-LR-N2011-1/NP1 contains the source data for Table 5 in USPS-T-1.

Such a log or index might be unnecessary if the Postal Service were to file a redacted version of USPS-LR-N2011-1/NP1. This might well allow participants to obtain information about the purported non-public document without actually needing to obtain access to the non-public information. The Postal Service's request for non-public treatment of materials should be narrowly tailored so that no unrestricted information is withheld. To the extent that the Postal Service claims that all of the information contained in the entire collection of documents in USPS-LR-N2011-1/NP1 requires confidential treatment, such a claim appears likely to be overbroad. For example, some of the graphical depictions in the library reference appear to be virtually identical to those filed publically as testimony. Similarly, the library reference's preface and explanatory information do not appear to consist of information of facility-specific and disaggregated walk-in revenue information. The Postal Service should review the entire library reference and file a redacted version that is narrowly tailored to withhold only confidential information. Additionally, to the extent the type of information contained in the redacted materials is not evident from the redacted version on its face, the Postal Service should file a *Vaughn* Index or privilege log that describes the confidential information being withheld.

USPS-LR-N2011-1/NP2. Library reference USPS-LR-N2011-1/NP2 contains revenue distribution analysis. The Motion seeks to compel the Postal Service to aggregate some of that data and provide it within several categories of "revenue brackets." The Motion contends that this will allow participants to evaluate the accuracy of the listing of facilities subject to evaluation. First, the Postal Service's claim that the revenue brackets are "arbitrarily defined" is disingenuous. The revenue tiers listed in the Motion mirror the categories of postal retail facilities identified for discontinuance review by the Postal Service.⁷

⁷ Compare Request of the United States Postal Service for an Advisory Opinion on Changes in the Nature of Postal Services, July 27, 2011, at 5.

However, the Motion does not explain how the receipt of this information is reasonably calculated to lead to admissible evidence or how his case could be enhanced by evaluating the accuracy of the listing of facilities subject to evaluation in USPS-LR-N2011-1/NP2. Accordingly, with respect to USPS-LR-N2011-1/NP2, this request is denied.

RULING

The David B. Popkin Motions dated July 28, 2011 and August 11, 2011 related to USPS-LR-N2011-1/NP1 and USPS-LR-N2011-1/NP2 are granted in part and denied in part as discussed in the body of this Ruling. The Postal Service shall provide the information required in this Ruling by August 19, 2011.

Ruth Y. Goldway
Presiding Officer